

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Mar 16, 2017**

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF WASHINGTON**

DAWNAVA L. NIELSEN,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL

SECURITY,

Defendant.

No. 2:15-cv-00322-MKD

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 19, 22

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 19<sup>1</sup>, 22. The parties have consented to proceed before a magistrate judge. ECF No. 9. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court grants, in part, Plaintiff's motion (ECF No. 19) and denies Defendant's motion (ECF No. 22).

<sup>1</sup>The Court requests that future filings conform with Local Rules 7.1(e) and 10.1(a)(2).

## JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

## STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”  
2 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate  
3 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The  
4 party appealing the ALJ’s decision generally bears the burden of establishing that  
5 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

### 6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered “disabled” within  
8 the meaning of the Social Security Act. First, the claimant must be “unable to  
9 engage in any substantial gainful activity by reason of any medically determinable  
10 physical or mental impairment which can be expected to result in death or which  
11 has lasted or can be expected to last for a continuous period of not less than twelve  
12 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s  
13 impairment must be “of such severity that [she] is not only unable to do [her]  
14 previous work[,] but cannot, considering [her] age, education, and work  
15 experience, engage in any other kind of substantial gainful work which exists in  
16 the national economy.” 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to  
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §  
19 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work  
20 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial

1 gainful activity,” the Commissioner must find that the claimant is not disabled. 20  
2 C.F.R. § 416.920(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis  
4 proceeds to step two. At this step, the Commissioner considers the severity of the  
5 claimant’s impairments. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers  
6 from “any impairment or combination of impairments which significantly limits  
7 [her] physical or mental ability to do basic work activities,” the analysis proceeds  
8 to step three. 20 C.F.R. § 416.920(c). If the claimant’s impairments do not satisfy  
9 this severity threshold, however, the Commissioner must find that the claimant is  
10 not disabled. 20 C.F.R. § 416.920(c).

11 At step three, the Commissioner compares the claimant’s impairments to  
12 severe impairments recognized by the Commissioner to be so severe as to preclude  
13 a person from engaging in substantial gainful activity. 20 C.F.R. §  
14 416.920(a)(4)(iii). If any impairment is as severe or more severe than one of the  
15 enumerated impairments, the Commissioner must find the claimant disabled and  
16 award benefits. 20 C.F.R. § 416.920(d).

17 If the severity of the claimant’s impairments do not meet or exceed the  
18 severity of the enumerated impairments, the Commissioner must pause to assess  
19 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),  
20 defined generally as the claimant’s ability to perform physical and mental work

1 activities on a sustained basis despite her limitations, 20 C.F.R. § 416.945(a)(1), is  
2 relevant to both the fourth and fifth steps of the analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's  
4 RFC, the claimant is capable of performing work that she has performed in the past  
5 (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is capable of  
6 performing past relevant work, the Commissioner must find that the claimant is not  
7 disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of performing such  
8 work, the analysis proceeds to step five.

9 At step five, the Commissioner considers whether, in view of the claimant's  
10 RFC, the claimant is capable of performing other work in the national economy.  
11 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner  
12 must also consider vocational factors such as the claimant's age, education and  
13 past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of  
14 adjusting to other work, the Commissioner must find that the claimant is not  
15 disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to  
16 other work, the analysis concludes with a finding that the claimant is disabled and  
17 is therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

18 The claimant bears the burden of proof at steps one through four. *Tackett v.*  
19 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,  
20 the burden shifts to the Commissioner to establish that (1) the claimant is capable

1 of performing other work; and (2) such work “exists in significant numbers in the  
2 national economy.” 20 C.F.R. § 416.920(c)(2); *Beltran v. Astrue*, 700 F.3d 386,  
3 389 (9th Cir. 2012).

### 4 **ALJ’S FINDINGS**

5 Plaintiff applied for Title XVI Supplemental Security Income (SSI) benefits  
6 on January 23, 2012. Tr. 177-83. The application was denied initially, Tr. 134-41,  
7 and on reconsideration, Tr. 145-51. Plaintiff appeared at a hearing before an  
8 Administrative Law Judge (ALJ) on May 23, 2014. Tr. 47-81. On June 10, 2014,  
9 the ALJ issued a decision reopening Plaintiff’s February 22, 2010<sup>2</sup> SSI application  
10 and denying Plaintiff’s claim for benefits. Tr. 20-33.

11 At step one, the ALJ found that Plaintiff had not engaged in substantial  
12 gainful activity since the date of application, February 22, 2010. Tr. 22. At step  
13 two, the ALJ found Plaintiff had the following severe impairments: lumbar  
14 degenerative disc disease, asthma, morbid obesity, status post abdominal  
15 herniorrhaphy, pain disorder, anxiety disorder, social phobia, major depressive  
16 disorder, personality disorder, and substance abuse. Tr. 22. At step three, the ALJ  
17 found that Plaintiff did not have an impairment or combination of impairments that

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19 <sup>2</sup>The February 22, 2010 application was protectively filed on February 9,  
20 2010. Tr. 164, 228.

1 met or medically equaled a listed impairment. Tr. 22. The ALJ then concluded  
2 that Plaintiff had the RFC to perform light work, with the following limitations:

3 She can occasionally climb ladders, ropes or scaffolds. She can  
4 frequently climb ramps and stairs, balance, stoop, crouch, kneel, and  
5 crawl. She should avoid concentrated exposure to hazards such as use  
6 of moving machinery and unprotected heights. She can perform  
7 simple, routine and repetitive tasks. She can perform simple decision-  
8 making. She can have simple changes in the work setting. She  
9 should not have fast-paced production requirements. She can have  
10 occasional and superficial interaction with the public. She can have  
11 superficial interaction with coworkers and supervisors. She should  
12 not work in close cooperation or coordination with others.

13 Tr. 24. At step four, the ALJ found that Plaintiff was unable to perform any past  
14 relevant work. Tr. 32. At step five, the ALJ found that there were other jobs that  
15 exist in significant numbers in the national economy that Plaintiff could perform  
16 within the assessed RFC, including weld inspector, garment sorter, and inspector  
17 packer. Tr. 32-33. On that basis, the ALJ concluded that Plaintiff was not disabled  
18 as defined in the Social Security Act during the adjudicative period. Tr. 33.

19 On September 21, 2015, the Appeals Council denied review, Tr. 1-6, making  
20 the Commissioner's decision final for purposes of judicial review. *See* 42 U.S.C.  
1383(c)(3); 20 C.F.R. § 416.1481.

### ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying  
her SSI benefits under Title XVI of the Social Security Act. ECF No. 19. Plaintiff  
raises the following issues for this Court's review:

- 1 1. Whether the ALJ properly discredited Plaintiff's symptom reports;
- 2 2. Whether the ALJ properly weighed the opinions of lay witnesses;
- 3 3. Whether the ALJ properly weighed the medical opinion evidence;
- 4 4. Whether the ALJ properly determined if Plaintiff met or equaled listing
- 5 12.08; and
- 6 5. Whether the ALJ's vocational hypothetical was valid.

7 ECF No. 19 at 11-21.

## 9 DISCUSSION

### 10 A. Plaintiff's Symptoms Reports

11 Plaintiff contests the ALJ's finding that her symptom reports were less than  
12 fully credible. ECF No. 19 at 16-19.

13 An ALJ engages in a two-step analysis to determine whether a claimant's  
14 testimony regarding subjective pain or symptoms is credible. "First, the ALJ must  
15 determine whether there is objective medical evidence of an underlying  
16 impairment which could reasonably be expected to produce the pain or other  
17 symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).  
18 "The claimant is not required to show that her impairment could reasonably be  
19 expected to cause the severity of the symptom she has alleged; she need only show



1 that it could reasonably have caused some degree of the symptom.” *Vasquez v.*  
2 *Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

3 Second, “[i]f the claimant meets the first test and there is no evidence of  
4 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
5 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
6 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014). “General  
7 findings are insufficient; rather, the ALJ must identify what testimony is not  
8 credible and what evidence undermines the claimant’s complaints.” *Id.* (quoting  
9 *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)); *Thomas v. Barnhart*, 278 F.3d  
10 947, 958 (9th Cir. 2002) (“[T]he ALJ must make a credibility determination with  
11 findings sufficiently specific to permit the court to conclude that the ALJ did not  
12 arbitrarily discredit claimant’s testimony.”). “The clear and convincing [evidence]  
13 standard is the most demanding required in Social Security cases.” *Garrison v.*  
14 *Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r, of Soc. Sec.*  
15 *Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

16 The ALJ found that Plaintiff’s medically determinable impairments could  
17 reasonably be expect to cause her alleged symptoms, but that Plaintiff was less  
18 than fully credible concerning the intensity, persistence, and limiting effects of  
19 these symptoms. Tr. 25. The ALJ reasoned that Plaintiff was less than fully  
20 credible because (1) her allegations were inconsistent with the medical evidence,

(2) her allegations were inconsistent with her reported daily activities, and (3) the record included evidence suggesting she exaggerated symptoms and limitations. Tr. 28-29.

*1. Inconsistent with Medical Record*

The ALJ gave less weight to Plaintiff's statements because the medical record did not substantiate Plaintiff's allegations of disabling limitations. Tr. 28-29.

Medical evidence is a relevant factor in determining the severity of a claimant's pain and its disabling effects. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); 20 C.F.R. § 416.929(c)(2); *see also* S.S.R. 96-7p.<sup>3</sup> However, it cannot serve as the sole reason for rejecting a claimant's credibility. *Rollins*, 261 F.3d at 857.

As discussed below, the other reasons the ALJ provided for finding Plaintiff less than fully credible failed to meet the specific, clear and convincing standard.

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<sup>3</sup>S.S.R. 96-7p was superseded by S.S.R. 16-3p effective March 16, 2016. The new ruling also provides that the consistency of a claimant's statements with objective medical evidence and other evidence is a factor in evaluating a claimant's symptoms. S.S.R. 16-3p at \*6. Nonetheless, S.S.R. 16-3p was not effective at the time of the ALJ's decision and therefore does not apply in this case.

1 Therefore, under *Rollins* this reason cannot stand alone to support an adverse  
2 credibility determination.

3 2. *Reported Daily Activities*

4 The ALJ determined that Plaintiff's reported daily activities of gardening,  
5 caring for two children, completing her personal care, cleaning, doing her laundry,  
6 preparing meals, driving a car, shopping in stores, handling her money, crafting,  
7 drawing, playing cards, watching television, and speaking on the phone were  
8 inconsistent with the alleged severity of Plaintiff's symptoms. Tr. 29.

9 A claimant's daily activities may support an adverse credibility finding if (1)  
10 the claimant's activities contradict her other testimony, or (2) the claimant "is able  
11 to spend a substantial part of [her] day engaged in pursuits involving performance  
12 of physical functions that are transferable to a work setting." *Orn v. Astrue*, 495  
13 F.3d 625 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.  
14 1989)). "The ALJ must make 'specific findings relating to [the daily] activities'  
15 and their transferability to conclude that a claimant's daily activities warrant an  
16 adverse credibility determination." *Id.* (quoting *Burch v. Barnhart*, 400 F.3d 676,  
17 681 (9th Cir. 2005)). A claimant need not be "utterly incapacitated" to be eligible  
18 for benefits. *Fair*, 885 F.2d at 603.

19 The ALJ failed to demonstrate how these activities contradicted Plaintiff's  
20 other testimony or that she was able to spend a substantial part of her day engaged

1 in these activities and that these activities are transferable to a work setting.  
2 Therefore, this reason fails to meet the specific, clear and convincing standard.

3       3.     *Evidence of Exaggerated Symptoms*

4       The Ninth Circuit has recognized a claimant's tendency to exaggerate as a  
5 legally sufficient reason to reject that claimant's symptom testimony. *See*  
6 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001).

7       The ALJ found Plaintiff less than fully credible because evidence in the  
8 record suggested that she exaggerated symptoms and limitations. Tr. 29. To  
9 support his determination, the ALJ relied upon Dr. Arnold's PAI profile and BDI-  
10 II score, Dr. Weir's positive Waddell's sign, and Dr. Islam-Zwart's statements. *Id.*  
11 On September 4, 2009, Dr. Arnold stated that Plaintiff's "PAI profile judged  
12 exaggerated but generally consistent with the above diagnostic impression. Rey  
13 15-Item Test [with in normal limits] suggesting she [was] not trying to malingering  
14 with regard to memory function." Tr. 753. He additionally stated that Plaintiff's  
15 "BDI-II score of 45 suggests severe depression, but scores over 40 tend to be  
16 suspect for embellishment." *Id.* On January 24, 2010, Dr. Weir completed a  
17 consultative examination of Plaintiff and stated that an "[e]xamination of the back  
18 revealed exquisite tenderness to light palpation in the lumbar area. This is  
19 considered a positive Waddell's sign." Tr. 794. Dr. Weir went on to state that  
20 Plaintiff was observed in the parking lot before and after the examination, stating

1 “[s]he ambulated at an average pace without difficulty and without obvious  
2 discomfort,” and found that there was no justification for limiting Plaintiff’s ability  
3 to function in the workplace. Tr. 794-95. On June 4, 2010, Dr. Islam-Zwart  
4 completed a consultative examination, in which she stated that Plaintiff “presents  
5 as rather dramatic and irritable, and calls attention to her problems seemingly more  
6 than is warranted.” Tr. 847. However, Dr. Islam-Zwart also stated that Plaintiff  
7 “does not appear to be clearly volitionally and deliberately exaggerating her  
8 symptoms, but there is undoubtedly some reinforcement for her in the sick role and  
9 the associated external gain.” *Id.*

10 Plaintiff argues that the evidence of her histrionic tendencies are  
11 manifestations of her mental illnesses. ECF No. 19 at 18. In cases involving  
12 mental illnesses, the ALJ “must exercise a delicate discretion in determining  
13 whether the claimant’s complaints are faked or the product of physical and  
14 psychological conditions beyond [her] control.” *Polny v. Bowen*, 864 F.2d 661,  
15 664 (9th Cir. 1988). Here, there is evidence that Plaintiff’s exaggerations are a  
16 manifestation of her mental illness. *See* Tr. 847. The ALJ failed to consider the  
17 potential that these exaggerations were associated with her mental illnesses and, as  
18 such, this reason falls short of the specific, clear and convincing standard.

1 **B. Lay Witness Testimony**

2 Plaintiff challenges the ALJ's determination rejecting the statements  
3 provided by Robert Nielsen and Debra Snow. ECF No. 14 at 19-20.

4 Lay witness testimony cannot establish the existence of medically  
5 determinable impairments, but lay witness testimony is "competent evidence" as to  
6 "how an impairment affects [a claimant's] ability to work." *Stout v. Comm'r, Soc.*  
7 *Sec. Admin.*, 454 F.3d 1050 (9th Cir. 2006); 20 C.F.R. § 416.913; *see also Dodrill*  
8 *v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993) ("[F]riends and family members in  
9 a position to observe a claimant's symptoms and daily activities are competent to  
10 testify as to her condition."). To discount evidence from lay witnesses, an ALJ  
11 must give reasons "germane" to each witness. *Dodrill*, 12 F.3d at 919.

12 The ALJ's full discussion of Mr. Nielsen's and Ms. Snow's statements are  
13 as follows:

14 I have considered the statements of the claimant's significant other,  
15 Robert Nielsen (Ex. 17E and 9E), and mother, Debra Snow (Ex. 13E).  
16 While their statements may reflect their personal observations of the  
17 claimant, the medical evidence of record does not support finding  
18 greater limitations than those set forth in the above residual functional  
19 capacity.

20 Tr. 31. Defendant asserts that the ALJ found the statements inconsistent with the  
medical record and assigned them little weight. ECF No. 22 at 17-18. However,  
the ALJ's determination failed to assign any weight to the statements and failed to  
provide any rationale for rejecting the statements that were specific to the

1 statement or the witnesses. As such, the ALJ failed to provide “germane” reasons  
2 for rejecting the statements of Mr. Nielsen and Ms. Snow.

3       The Ninth Circuit has held that an ALJ’s failure to properly weigh the  
4 statements of a lay witness can be held harmless when the witness’s testimony was  
5 substantially the same as the claimant’s and the ALJ provided legally sufficient  
6 reasons for finding the claimant less than fully credible. *See Molina*, 674 F.3d at  
7 1121-22. Here, the ALJ’s reasons for finding Plaintiff less than fully credible did  
8 not meet the specific, clear and convincing standard. *See supra*. Therefore, the  
9 harmless error rule of *Molina* does not apply. Even if the ALJ had provided  
10 legally sufficient reasons to reject Plaintiff’s credibility, the statements of Mr.  
11 Nielsen and Ms. Snow differ from Plaintiff’s testimony addressed in the ALJ’s  
12 decision. First, the ALJ failed to discuss Plaintiff’s testimony that she relied on the  
13 use of a cane to ambulate outside the home. Tr. 25, 62. Second, Mr. Nielsen and  
14 Ms. Snow discussed Plaintiff’s need for a cane to assist in ambulation as early as  
15 2010 and again in 2012. Tr. 266, 297. While Plaintiff testified that she required a  
16 cane to ambulate outside her home, her testimony did not address how long she  
17 had been using the cane. Tr. 62. When the ALJ asked how long she had been  
18 using the cane, Plaintiff responded that John Colver “persisted on having me use it  
19 for the past year, a little over a year just in case I fall.” *Id.* Plaintiff testified as to  
20 how long her provider had instructed her to use her cane, not how long she had

1 actually been using it. As such, the lay witness testimony in this case contained  
2 information that the ALJ did not consider when discussing Plaintiff's testimony.  
3 The ALJ is to readdress the statements Mr. Nielsen and Ms. Snow on remand.

4 **C. Medical Opinion Evidence**

5 Plaintiff challenges the weight the ALJ gave to the opinions of Dr. Islam-  
6 Zwart, Dr. Arnold, and RN Bill Martin. ECF No. 19 at 11-16. Considering the  
7 claim is being remanded for the ALJ to readdress Plaintiff's credibility and the  
8 weight provided to lay witness evidence, the ALJ is also instructed to readdress the  
9 medical opinions contained in the record on remand in accord with 20 C.F.R. §  
10 416.927 taking effect on March 27, 2017. Specifically, when readdressing the  
11 opinion of RN Bill Martin, the ALJ is to review the opinion in light 20 C.F.R. §  
12 416.927(f).

13 **D. Listing 12.08**

14 Plaintiff argues that because the ALJ failed to properly credit the opinions of  
15 Dr. Islam-Zwart, Dr. Arnold, and RN Bill Martin, he erroneously found that  
16 Plaintiff did not meet or equal Listing 12.08. ECF No. 19 at 11-16. Since the  
17 claim is being remanded to address the errors discussed above, the ALJ is further  
18 instructed to readdress his step three determination on remand.



**E. Vocational Hypothetical**

Plaintiff argues that, due to the ALJ's treatment of Plaintiff's testimony, lay witness evidence, and medical opinions, the hypothetical presented to the vocational expert failed to set forth all of Plaintiff's limitations and was, as a result, invalid. ECF No. 19 at 21. Considering the ALJ is already readdressing Plaintiff's credibility, lay witness testimony, and medical opinions, in the event that a step four or five determination is necessary, the ALJ is to formulate a new RFC and present it in the form of a hypothetical to a vocational expert.

**REMEDY**

The decision whether to remand for further proceedings or reverse and award benefits is within the discretion of the district court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate where "no useful purpose would be served by further administrative proceedings, or where the record has been thoroughly developed," *Varney v. Secretary of Health & Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280 (9th Cir. 1990). *See also Garrison*, 759 F.3d at 1021 (noting that a district court may abuse its discretion not to remand for benefits when all of these conditions are met). This policy is based on the "need to expedite disability claims." *Varney*, 859 F.2d at 1401. But where there are outstanding issues that must be resolved

1 before a determination can be made, and it is not clear from the record that the ALJ  
2 would be required to find a claimant disabled if all the evidence were properly  
3 evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96  
4 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

5 In this case, it is not clear from the record that the ALJ would be required to  
6 find Plaintiff disabled if all the evidence were properly evaluated. Further  
7 proceedings are necessary for the ALJ to properly determine Plaintiff's credibility  
8 regarding her symptom reporting, properly address the opinions of lay witnesses,  
9 properly consider the medical opinions, properly address Listing 12.08, and  
10 formulate a new RFC. The ALJ will also need to supplement the record with any  
11 outstanding medical evidence and elicited testimony from a medical,  
12 psychological, and vocational expert.

### 13 CONCLUSION

#### 14 IT IS ORDERED:

- 15 1. Defendant's motion for summary judgment (ECF No. 22) is **DENIED**.
- 16 2. Plaintiff's motion for summary judgment (ECF No. 19) is **GRANTED**,  
17 **in part**, and the matter is **REMANDED** to the Commissioner for  
18 additional proceedings consistent with this Order.
- 19 3. Application for attorney fees may be filed by separate motion.

1 The District Court Executive is directed to file this Order, enter  
2 **JUDGMENT FOR THE PLAINTIFF**, provide copies to counsel, and **CLOSE**  
3 **THE FILE.**

4 DATED this 16th day of March, 2017.

5 Mary K. Dimke  
6 MARY K. DIMKE  
7 U.S. MAGISTRATE JUDGE  
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